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IN THE SUPREME COURT OF THE UNITED STATES.

October Term 1949.

No. 529

PHILLIPS PETROLEUM COMPANY, A CORPORATION,
Petitioner,

vs.

H. C. JONES, COLLECTOR OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF.

1. Respondent has failed to discuss one of the most important issues.

Petitioner divided the question presented into four subsidiary questions (Pet., p. 5). The first and foremost was whether the Court of Appeals erred in holding that an oil and gas lease is realty within the meaning of the stamp tax statute, notwithstanding "It may be conceded that when judged by the laws of the States of Oklahoma and Kansas, OR THE GENERAL FEDERAL LAW, an oil and gas lease is not realty or an estate therein."*

The fourth subsidiary question was whether an oil and gas lease is realty under the general federal law. (The Court of Appeals conceded that it was *not*.)

*All emphasis in quotations supplied.

The first subsidiary question was covered by Point I of Petitioner's Brief (p. 11). It was there said that the decision of the Court of Appeals conflicted with *Case* v. *Los Angeles Lbr. Co.*, 308 U. S. 106, 84 L. ed. 110; *McNally* v. *Hill*, 293 U. S. 131, 136, 79 L. ed. 238, 241; *Keck* v. *United States*, 172 U. S. 434, 446; and other decisions of the Court of Appeals for the Tenth Circuit (pp. 13-15). In Appendix B (p. 34) petitioner discussed the fourth subsidiary question for the purpose of showing that, not only did the Court of Appeals concede that an oil and gas lease was not realty under general federal law, but that it was right in making the concession—probably immaterial to the petition for writ of certiorari, and for that reason relegated to the appendix.

Respondent discusses the second and third subsidiary questions (Br., pp. 5, 8), dividing the second into two parts (the issues presented by Points II and III of petitioner's brief, pp. 17, 22), but fails to mention the other questions.

The Court will see upon examining the issues ignored by respondent that they not only stand unrefuted by respondent, but that they are in truth irrefutable; the Court will see that the decision below is in fact directly in conflict with the decisions of this Court cited above.

One of the most important questions (if not *the* most important question) in this case is whether the courts are at liberty to ignore the meaning of the language used by Congress in tax statutes, and, without the aid of a single extrinsic fact or circumstance, declare that Congress meant something entirely different from what it said. This Court has said no to this question many times before, and respondent apparently is at a complete loss for an answer to petitioner's contention in this respect, so ignores it.

2. Respondent's argument would change the statute to read "lands, tenements or other realty, *or any interest therein.*"

With respect to the issues which respondent discussed, petitioner is content, subject to a few comments, to rest upon the presentation made in its petition and supporting brief. Petitioner does wish to point out, however, that respondent undertakes to support the decision below upon the ground that "although under state law the oil and gas leases in question might technically be labeled as 'personalty,' nevertheless they conveyed such substantial *rights* and *interests* in real estate as to require the imposition of the stamp tax under Section 3482." And further, respondent says that the Court below held that "state law, while affixing the label 'personalty' to oil and gas leases, nevertheless treats such leases as *interests* in realty for many practical purposes."

It will thus be observed that respondent, while rejecting the theory that state law governs, points to no other guide, but proceeds upon the unsupported premise that oil and gas leases are "in substance transfers of *an interest in* realty and *therefore* subject to the stamp tax * * *." Thus respondent would, by passing comment, arbitrarily change the controlling language employed by Congress, "lands, tenements or other realty" to read "lands, tenements or other realty *or any interest* therein." No reason is advanced to ascribe to Congress any such intent. If the test of the tax were merely whether an instrument transfers "an interest in realty," then all leases of realty, including a lease of farm lands for agricultural purposes or, indeed, a lease of residential property, even though for a short duration, would be subject to the tax, for beyond doubt such leases create "interests in realty." And it is universally held,

not only by state law but by federal law, that such leases are chattels real and are personal property, not realty. *Lycoming Fire Insurance Co.* v. *Haven,* 95 U. S. 210; 32 Am. Jur., p. 39; 19 Am. Jur., p. 519. The Bureau of Internal Revenue has always ruled that such leases are not subject to the stamp tax (R. 34). If there is to be a distinction between chattels real, some falling in the category of personal property and others as realty, where is the dividing line? What is the standard for determination? If oil and gas leases are chattels real, what is there about them that requires their classification as realty under the stamp tax statute and does not require the same classification of other chattels real, including ordinary farm or urban leases? No attempt was made by respondent to explain or justify this patent incongruity, for, to be sure, it is not susceptible of explanation.

Moreover, the court below did not hold that "interests in realty" are realty, but on the contrary conceded that oil and gas leases are not realty *under state or general federal law. What other guide is there?* Or is it to be frankly conceded that the court has broadened the statute to cover interests in realty if the particular "interest in realty" under consideration conveys such susbtantial rights, in the court's uncontrolled judgment, as to "require the imposition of the stamp tax"?

Petitioner cites *Morrow* v. *Scofield,* 116 F. (2d) 17, as holding that oil and gas leases are in substance transfers of an *interest in realty* and therefore subject to the stamp tax. That case was decided however at a time when Section 84 of Treasury Regulations 71 (1932 ed.) was in force. It provided: (*a*) "What constitutes 'lands, tenements, or other realty' is determinable by the law of the state in which the property is situated." The court applied the law of

Texas which was that oil and gas leases are realty. True, in an off-hand manner, and without the citation of a single authority, the court added: "The Texas decisions aside, * * * we think the comprehensive language of the federal statute makes it quite plain that it was the intention of Congress to require the affixing of stamps to instruments of this kind, instruments which in substance convey interests in lands, tenements or other realty without regard to the particular legal effect and consequences which may be attached to them by the laws of a particular state." Thus the court assumed that *interests* in "lands, tenements or other realty" are "lands, tenements or other realty" under federal law. Not only was that an erroneous assumption (see petitioner's brief, Appendix B, pp. 34-37), but *the Tenth Circuit in this case conceded the contrary.* That case therefore does not sustain the Court of Appeals' decision in this case.

The petition for writ of certiorari should be granted and the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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